Newark Morning Ledger Company *and* Newark Typographical Union No. 103. Case 22–CA–18259

August 9, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On October 14, 1992, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed a brief in opposition to the exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. In adopting the judge's finding that the charge is not time-barred, we conclude that the Union was not on unequivocal notice that the Respondent had decided to implement the mandatory physical examination program for composing room personnel until sometime between October 1991 and January 1992. In this regard, we particularly note that the Respondent's May 9, 1991 letter referred to a ''present'' intention to implement the program in the summer, that it indicated that the Union should contact the Respondent if it had problems with the program, and that, after the Union wrote the Respondent less than 3 weeks later that it would resist such a program, the Respondent did not reply to the Union's letter and did not thereafter implement the program in the summer. In these circumstances, we conclude that the Respondent has failed to show based on the May 9 letter that a final decision to implement the program had been made. See *Postal Service Marina Center*, 271 NLRB 397 (1984).

2. Respondent relies on the Seventh Circuit's denial of enforcement of the Board's order in *Chicago Tribune Co.*, 304 NLRB 495 (1991), enf. denied 974 F.2d 933 (1992). However, the court's opinion was based on grounds not present in this case. More particularly, in that case, the union's general laws applied only to ''subjects concerning which no provision is made'' in the collective-bargaining agreement. That is, the general laws filled the gaps left by the collective-bargaining agreement. The court held that the company rule under attack in that case *was* addressed by a clause in the collective-bargaining agreement, viz, the management-rights clause. Thus, the general laws did not apply to that rule. By contrast, in the instant case, the general laws applied unless they were in conflict with specific provisions of the collective-bargaining agreement. The collective-bargaining agreement contains no specific provisions that conflict with the general laws at issue herein. Thus, the general laws do apply.

Respondent also argues that the general laws provision at issue herein applies only to physical examinations for applicants for employment. We disagree. The Seventh Circuit, in *Chicago Tribune*, supra, did not resolve the issue. The court simply stated, in dicta, that the parties failed to raise the issue.

The Respondent also argues that its interpretation of the general laws provision is supported by a 1976 arbitration award interpreting the same provision in the Mailers' contract. In adopting the judge's rejection of the Respondent's argument, we note that the Board itself inteprets the phrase ''conditions of employment,'' in connection with Section 8(a)(5) and (d) and Section 9(a), to encompass terms of employment of an employer's current employees. See *Star Tribune*, 295 NLRB 543, 546 (1989). Therefore, the contractual provision, both by its plain language, as found by the judge, and consistent with our interpretation of our statutory language, bars physical examinations of current journeymen employees as a ''condition of employment'' and is not limited to preemployment physicals.

Moreover, the contrary 1976 arbitration award involving another union is insufficient to ''establish a pattern of decisions clear enough'' to mandate a different interpretation of the general laws provision. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983). We note that the Respondent made no showing that the parties intended to incorporate the extra-unit award into their own subsequent agreement or that the award was intended to be binding in another unit beyond the terms of the agreement under which it arose.

Finally, we think it anomalous to conclude that the Union, in its general laws, would seek to protect journeymen *applicants* but not journeymen who are in the unit and represented by the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Newark Morning Ledger Company, Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We have not considered the evidence submitted with the Respondent's exceptions to the judge's decision and supporting brief. That evidence is outside the record.

Stephen Holroyd, Esq., for the General Counsel.
Bruce Berry, Esq. (Sabin, Bermant & Gould), for the Respondent.
Richard Rosenblatt, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Newark, New Jersey, on August 13, 1992.[1] The complaint, which issued on March 13, was based on an unfair labor practice charge and first and second amended charges filed on January 31, February 25, and March 10 by Newark Typographical Union No. 103 (the Union). The complaint alleges that Newark Morning Ledger Co. (Respondent) violated Section 8(a)(1) and (5) of the Act, on about January 21, by failing to continue in effect all terms and conditions of employment contained in its agreement with the Union without first obtaining the Union's consent.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation with its principal office in Newark, New Jersey (the facility), is engaged in the publication, circulation and distribution of the Star-Ledger, a daily newspaper in the Newark, New Jersey area. During the 12-month period preceding March, Respondent derived gross revenues in excess of $200,000, and held membership in or subscribed to various interstate news services, including the Associated Press. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

The Union has represented Respondent's typographical employees for many years and they are parties to a collective-bargaining agreement entered into in 1970, extended in 1982 and still in effect. Section 6-02 of the agreement states:

> It is understood and agreed that the General Laws of the International Typographical Union in effect at the time of signing, not in conflict with this contract or with Federal or State law shall govern relations between the parties on conditions not specifically enumerated herein.

The general laws of the International Typographical Union (the International),[2] at article II, section 14, provides: ''No journeyman shall be required to submit to a physical examination as a condition of employment.'' The parties are in agreement that this provision has remained unchanged in the general laws since at least 1970. Section 28-08 of the agreement states:

> It is agreed that Local Union laws not affecting wages, hours or working conditions and the general laws of the International Typographical Union, shall not be subject to arbitration.

By letter dated May 9, 1991, Mark Newhouse, vice president and general manager of Respondent, wrote to Fred Kraut, president of the Union:

> Recently several former composing room employees have filed Worker's Compensation claims with respect to pulmonary conditions which they allegedly acquired while working at the Star-Ledger.
>
> There has been no finding to date that any such pulmonary conditions are work related. However, in order to provide our current employees with whatever medical treatment is appropriate in the event any of them are suffering from any pulmonary or other potential health conditions, the Star-Ledger intends to institute annual physical examinations.
>
> Of course, the results of these physical examinations will not result in the termination of any employee in the Composing Room. In addition, we are willing to make the results of these exams available to each employee's personal physician.
>
> I would appreciate your calling if you have any problems concerning this program. It is our present intention to implement this program this summer.

By letter dated May 24, 1991, Kraut wrote to Newhouse:

> I am in receipt of your letter of May 5, 1991, Re: Annual Physical Examinations and I must apologize for the lateness of my response, do to the up coming move to our office [sic].
>
> The Union will resist this action, as we never negotiated annual physical examinations; to my knowledge no one has ever asked for annual physical examinations, or for treatment of any kind.

Respondent never responded to this letter and Kraut testified that he therefore thought that the issue was moot.

The next that Kraut heard of the issue was in about November 1991 when he learned that employees in the composing room had taken physicals; he did not object at that time because he understood that these physicals were taken voluntarily. In addition, in about December 1991 or January, he was informed by his chairman at the facility that Respondent had posted a notice on the bulletin board in the composing room saying that physical examinations were mandatory for all composing room employees. The notice is dated January 21, is addressed to the composing room employees, and states that the ''Company has instituted a policy requiring annual physical exams for all composing room personnel.'' Kraut testified that between his May 24, 1991 letter, and this posting in the composing room, Respondent had not spoken to him about this subject. After being informed of the posting in the composing room, Kraut wrote to Newhouse, by letter dated January 22:

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1992.

[2] In about 1987, the International merged with the Communications Workers of America (CWA) and became the Printing, Publishing and Media Workers Sector (PPMWS) of the CWA. The general laws of the PPMWS contains the same prohibition against physical examinations as is contained in the general laws of the International.

> It was brought to my attention that the company posted a notice on the board requiring employees to submit to physical exams.
>
> Again, I must reiterate the union's position on this matter as stated to you in my letter of May 24, 1991. ''The Union will resist that company demand that composing room employees be required to take physical examinations.''

Respondent did not respond to this letter, and by letter dated January 27, Kraut requested that a grievance meeting be held at the earliest convenient time to discuss the physical examination issue as well as two other specific issues.

The grievance meeting took place on January 31. Kraut testified that at this meeting he told Newhouse and Bruce Berry, attorney for Respondent, that they were bound by the prohibition against physicals contained in the International's general laws, which were incorporated into the contract. Newhouse said that the laws were archaic and that they had instituted the physical examinations because they were getting a large number of Workmen's Comp claims, mainly involving pulmonary or hearing problems and if there was a health problem they wanted to know about it. Kraut asked for a guarantee that nobody would be discharged for refusing to take a physical; this request was refused. Either Newhouse or Berry then said that the Union had done nothing in response to the notices about the physicals and Kraut answered that he had sent Respondent two letters objecting; what more could he do? He also reminded them that the general laws are not arbitrable.

Newhouse testified that during 1990 Respondent received a large number of Workmen's Compensation claims from former employees complaining of ailments allegedly due to noise, dust or fumes at the facility during the period of their employ with Respondent. It was these claims that prompted his May 9, 1991 letter to Kraut. He did not act on the physicals immediately after receiving Kraut's May 24, 1991 letter because: ''I was waiting to see what form of resistance the union would take. The letter stated that they were going to resist.'' In about October, he instructed the composing room foreman to begin arranging for physicals for the composing room employees and some of these employees did take physicals at that time, although he does not know whether the employees took these physicals voluntarily. He also posted a number of notices in the composing room about physicals between that time and January 21; he testified that the January 21 notice was posted only because some of the composing room employees were concerned about whether the results of the physical would be confidential, and the notice states that results of the physicals would be kept confidential.

Newhouse also testified that prior to the mid-1980s, Respondent had two locals of the International at the facility: the local involved herein which represents the composing room employees, and the Mailers Union local. They had separate contacts. At the same time that the composing room employees affiliated with the CWA, the Mailers local affiliated with the Teamsters Union.

It is Respondent's position that the prohibition contained in the International's general laws only applies to preemployment physicals. In this regard, Respondent placed into evidence an arbitrator's decision in 1976 relating to physicals instituted by Respondent with its employees who were members of the Mailers' Union, at the time, still a part of the International. Its contract with Respondent contained the same provision as the Union's, concerning the International's general laws, and specifically the prohibition against physicals. Citing the serious health purposes that were involved, the arbitrator refused to disallow the physicals. Newhouse also identified a 1979 letter written by an individual then employed by the International in its Bureau of Contracts. This letter contains suggested language that is intended to make the requirement of physical examinations more palatable to the International, although it is not clear what language eventually became part of the contract.

The sole allegation herein is that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally instituting physical examinations for its composing room employees without approval of the Union, in contravention of its contract with the Union. The facts are clear and undenied: in May 1991 Respondent proposed the idea of physical examinations to the Union and 2 weeks later Kraut answered that the Union would ''resist this action,'' clearly a rejection of Respondent's request. In about October 1991, but certainly no later than January, Respondent instituted a program making mandatory physical examinations (admittedly a mandatory subject of bargaining) for the composing room employees. The Union never changed its position on the subject since Kraut's May 1991 letter; in fact, in January, when he learned of the physicals, he again wrote to Respondent objecting to the physicals. The contract between the parties states that in certain situations, the International's general laws shall govern relations between the parties. Article II, section 14 of the general laws states: ''No journeyman shall be required to submit to a physical examination as a condition of employment.'' Respondent's position is that this provision was meant to prohibit only preemployment physicals; I reject this argument. If this is what the provision meant it could easily have said so, but didn't. In addition, in *Chicago Tribune Co.*, 304 NLRB 495 (1991), the Board interpreted this same article II, section 14 of the general laws to apply to drug and alcohol testing of existing employees. I therefore reject Respondent's interpretation of article II, section 14 of the International laws and find, as alleged by General Counsel and Charging Party, that, as it states, it prohibits all physical examinations.

Respondent has a number of additional defenses. One is that the charge is barred by Section 10(b) of the Act. I reject this defense. The physicals for the composing room employees were instituted between October 1991 and January. Although it is not clear whether the earlier physicals were voluntary or mandatory, what is clear is that the unfair labor practice charge was filed on January 31, clearly within 6 months of the institution of the physical exams. Respondent alleges, however, that the 6-month period should begin to run in May 1991, when Newhouse wrote to Kraut about his intention to institute the physicals, and therefore the Union would have had to file its charge by November 1991. However, Newhouse's letter of May 9, 1991, stated that Respondent ''intends'' to institute the physicals. At that point, Respondent had done nothing in violation of the law or its contract with the Union. It was not until October 1991 (or sometime between that date and January) when Respondent actu-

ally began requiring the physical exams that the statute began to run. This defense is therefore dismissed.

Respondent next defends that after receiving Newhouse's May 9, 1991 letter the Union, by not requesting bargaining on the subject of physical exams, waived its right to bargain about the subject and the Respondent had the right to unilaterally implement physical exams. This defense must also be rejected.[3] Kraut's letter of May 24, 1991, answering Newhouse's letter, said that the Union would ''resist'' Respondent's attempt to institute mandatory physical exams. The Union was under no affirmative obligation to also propose negotiations on the subject. If Respondent were acting in good faith on the subject, it would have proposed negotiations and negotiated to an agreement on the subject or to impasse. Instead, Respondent never responded to Kraut's May 24, 1991, except to unilaterally institute the physical exams months later.

Respondent also defends that the general laws of the International are no longer binding on Respondent because of the change in the Union's status, from a local in the International to a local of the PPMWS of the CWA. The evidence establishes that in about 1987 the Union merged with the CWA and the International's general laws remained unchanged and are still in effect. The only difference is that they are referred to as the bylaws, general laws and conference laws of the PPMWS of the CWA, instead of the International. I fail to see how this change from a local of the International to a local of the PPMWS of the CWA nullifies this general law or any of the general laws. I therefore reject this defense as well.

At the hearing herein a 1976 arbitrator's ruling allowing Respondent to institute mandatory physical exams was received in evidence. An arbitrator's ruling (and one involving a different union) is clearly not determinative herein.

Finally, Respondent alleges that this matter should be deferred to the parties' contractual grievance and arbitration procedure. Although this would normally be a valid defense under *Collyer Insulated Wire*, 192 NLRB 837 (1971), the contract between the parties states that the general laws shall not be subject to arbitration. I therefore find that this matter is inappropriate for deferral. *Inland Container Corp.*, 298 NLRB 715 (1990).

CONCLUSIONS OF LAW

1. Respondent Newark Morning Ledger Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Newark Typographical Union, No. 103 is a labor organization within the meaning of Section 2(5) of the Act.

3. By implementing mandatory physical examinations in about October 1991 to January 1992, without the consent of the Union, Respondent unilaterally modified its collective-bargaining agreement with the Union. This conduct constitutes a refusal to bargain within the meaning of Section 8(d) of the Act, and is therefore an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) and (5) of the Act I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. In this regard, I shall recommend that Respondent be ordered to rescind its implementation of mandatory physical examinations for its composing room employees. If any composing room employee has been disciplined for refusing to take a physical examination pursuant to this rule, I shall recommend that this discipline be rescinded and anything contained in employee files regarding such discipline be removed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Newark Morning Ledger Co., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing or carrying out mandatory physical examinations for its composing room employees, which is contrary to its existing collective-bargaining agreement with Newark Typographical Union No. 103, without the consent of the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the requirement that all composing room employees must have physical examinations and rescind any punishment to employees who refused such examinations.

(b) Post on a bulletin board in the composing room at its facility in Newark, New Jersey, and at other locations at its facility, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] Counsel for Respondent, in his brief, repeats the argument that it is not enough for a union to object to an employer's announcement of a change, but that the Union must affirmatively request bargaining as well, citing numerous cases to support this proposition. Although this is true, this rule applies to unilateral changes of noncontractual terms and conditions of employment that are mandatory subjects of bargaining. The instant matter is distinguishable as it involves the unilateral change of a contractual provision. The same affirmative request for bargaining is not required in this situation.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT require our composing room employees to take physical examinations, which is contrary to our collective-bargaining agreement with Newark Typographical Union No. 103 (the Union), without the consent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL rescind our rule requiring all composing room employees to take physical examinations and WE WILL rescind any discipline, or proof of discipline, if any, of any composing room employee who was disciplined for refusing to take a physical examination.

NEWARK MORNING LEDGER CO.